

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CURTIS C.,

Claimant,

vs.

REGIONAL CENTER OF EAST BAY,

Service Agency.

OAH No. 2009091238

**DECISION**

On December 1, 2009, in Oakland, California, Perry O. Johnson, Administrative Law Judge, State of California, Office of Administrative Hearings heard this matter.

Ms. Pamela Higgins, Fair Hearing Specialist, represented the Regional Center of the East Bay (service agency)

Claimant was represented by his mother.

On December 1, 2009, the parties submitted the matter for decision and the record closed.

**ISSUE**

Following the July 2009 amendments to the Lanterman Act, Welfare and Institutions Code section 4500 et seq., through money paid by the service agency may Claimant continue to receive socialization training services from H.A.T.C.H, and in particular through a one-on-one arrangement administered by a single individual counselor? If not, does Claimant come within an exception to the prohibition on purchasing social recreation services, as described in section 4648.5, subdivision (c)?<sup>1</sup>

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<sup>1</sup> Unless otherwise indicated, all statutory references are to the Welfare and Institutions Code.

## FACTUAL FINDINGS

1. Claimant is a 17-year-old male teenager, who is eligible for services through the service agency based on "Autism Spectrum Disorder, Very Mild." Claimant is a highly functioning individual, whose mother foresees him attending college.

Claimant resides with his father, mother and older brother in a house located in Walnut Creek, Contra Costa County. Claimant's mother works full time as an insurance agent. His father does not work, but devotes "time with" Claimant's supervision, care and education.

2. In recent years the principal objectives of the Individual Program Plan (IPP) documents for Claimant have set out long-range goals to "improve his socialization and communication skills."

3. The socialization training services received by Claimant are by way of a 1:1 companion program executed by a male worker of H.A.T.C.H.<sup>2</sup> His companion, Mr. Steve Whittle, has exerted efforts to expose Claimant to the world outside Claimant's home, which he shares with his immediate family. The worker has an undergraduate degree in psychology, and is very active with outdoors endeavors. The H.A.T.C.H. worker seems to be the only individual other than Claimant's mother, father and older brother who provides 1:1 supervision on a regular basis. Claimant and the H.A.T.C.H. worker have enjoyed a very close relationship for more than two years.

4. Effective July 28, 2009, an Assembly Bill amended existing sections of, and added new sections to, the Lanterman Developmental Disabilities Services Act. Because it "addresses the fiscal emergency declared by the Governor by proclamation on July 1, 2009," the act was declared an urgency measure and took effect immediately.

New section 4648.5 suspends regional centers' authority to purchase the following services: (1) camping services and associated travel expenses; (2) social recreation activities, except for those activities vendored as community-based day programs; (3) educational services for children three to 17, inclusive, years of age; and (4) nonmedical therapies, including, but not limited to, specialized recreation, art, dance, and music. This suspension of purchase authority is to remain in effect pending implementation of the Individual Choice Budget (ICB), with the expectation that the ICB "will result in state budget savings sufficient to offset the costs of providing" these services. For existing consumers currently receiving such services, the law took effect on August 1, 2009. The socialization training services at issue in this case are properly classified as social recreation activities.

5. Regional centers, such as service agency, retain authority to purchase social recreation activities only where a consumer falls within the exemption set forth in section 4648.5, subdivision (c), which provides:

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<sup>2</sup> H.A.T.C.H. denotes "Help Another Toward Creative Happiness."

An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of a service identified in subdivision (a) when the regional center determines that the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer's needs.

6. On August 31, 2009, service agency issued a Notice of Proposed Action (NOPA) to claimant, advising that it proposed to suspend service agency funding for socialization training services in order to implement section 4648.5. The NOPA advised Claimant's parents that the legal authority for the proposed action was section 4648.5. The NOPA indicated that the service agency "shall not purchase Socialization Training Program/Social Recreation Services." By a letter, dated September 28, 2009, Christine Hanson, a service agency case management supervisor, clarified the NOPA. The September 2009 letter noted that in April 2007 the social recreation program was instituted for Claimant because he was "struggling with socialization and communication skills." But over the more than two-year span of the social recreation program, Claimant has had a single H.A.T.C.H. worker. Rather than the H.A.T.C.H. worker pursuing a scheme to place Claimant in environments that involved spending time with Claimant's peers, whether non-disabled or disabled, the worker focused on taking Claimant hiking alone, eating meals with the worker, viewing movies together, and going to the worker's home to interact with the 25-year-old worker's roommates and friends. The service agency case management supervisor concluded that the H.A.T.C.H. service, through the single worker, did not meet the criteria as a program that was primary and critical in ameliorating the developmental disability impacting Claimant.

7. On September 9, 2009, the service agency received Claimant's mother's Fair Hearing Request. Claimant's mother expressed that the "H.A.T.C.H. service . . . has been crucial in helping [Claimant] in community integration. [Claimant] does well academically but [he] has no friends. He regards his H.A.T.C.H. worker as his mentor-friend and [he] looks forward to going out to the community with him every week. . . ."

8. Ms. Jennifer Leung, the case manager for Claimant, offered evidence at the hearing of this matter. Ms. Leung is an employee of Asian Community Mental Health Services, which is a contract delegate of the service agency.

Ms. Leung meets with Claimant once each year. The immediate past annual review occurred in October 2009 at the business office of Claimant's mother; but Claimant was not present, because the mother felt Claimant would be uncomfortable, or would not like, to have the case manager and his mother talk about him. (It is inferred that Ms. Leung has not personally observed Claimant for more than two years.)

Ms. Leung has been Claimant's case manager for about three years. But the Asian Community Mental Health Services has been responsible for Claimant's "case" since April 2003.

Ms. Leung has seen Claimant on a few occasions. When she last observed him, Ms. Leung noted Claimant to be "a little shy." He did not project behavior that met age appropriate characteristics. Claimant does not "talk a lot with people" with whom he is not familiar. But Claimant has insisted that he does not require special treatment as a person impaired by a developmental disability.

Within the last three years, Ms. Leung has prompted Claimant to undergo a psychiatric evaluation. Claimant has diagnoses for an anxiety problem, some depression as well as an obsessive-compulsive disorder. (In the past he has been markedly adverse to germs and he has had fear of contracting disease produced by airborne microbes.)

Claimant, who is now an 11th grader in high school, is being home schooled due to his anxiety in class settings. Academically, Claimant has performed very well in school. (Ms. Leung's October 2009 Annual Review for Claimant noted that he "does extremely well academically and currently [he is] receiving straight A's on his report [card].") Claimant has completed the high school exit examination and is believed to have passed the test. Although he is now in a home school setting, his mother expects that he will enroll in a public high school for his senior year.

Claimant is able to run, jump and climb. He has a mild coordination difficulty as he has trouble hopping on one foot. Ms. Leung's Annual Report observed that "he does not enjoy physical activity and prefers not to participate in activities that consist of a great deal of movement." Claimant can attend to personal hygiene independently. He can perform household chores, but only on request. He can make purchases independently. And he has good safety awareness skills. Ms. Leung, in fact, notes Claimant to be very independent in his independent living skills.

Claimant's greatest weakness, which relates to his developmental disability, entails having appropriate social skills. Ms. Leung has had a concern for Claimant's high level of anxiety and stress. He has no friends of his own age. He appears to have limited expressive language skills. He speaks in a monotone voice and he "does not know how to initiate social interactions." He does not maintain the same interests as his peers, namely, high school teenagers.

Ms. Leung notes that although Claimant's obsessive-compulsive difficulties seem to have abated, in recent times he has fostered anxiety in being in school settings. He last attended Northgate High School. His home school program is called Home Hospital due to certain mental health problems that preclude him from attending a public high school for the last school year.

Ms. Leung referred Claimant to H.A.T.C.H. and set about to encourage the assigned worker to "bring [Claimant] out to the community to interact with peers in settings away from school or his residence." But, Ms. Leung noted that there seemed to be only interaction between the H.A.T.C.H. worker and Claimant so that the goal of prompting Claimant to "go out to mingle with his peers," namely other teenagers, has neither addressed nor accomplished.

9. Claimant's mother made an emotional presentation at the hearing of this matter. She notes that Claimant plans to attend regular high school next year. Claimant's mother expects that Claimant will "move on to college." But, she believes that Claimant's only friend is represented by the H.A.T.C.H. worker.

10. The hearing record was provided with three progress reports by the H.A.T.C.H. worker. The progress reports were for the periods: February 16 to July 25, 2009; January 26 through February 25, 2008, and May 26 through June 25, 2007.

The reports were inadequate in showing that the services of H.A.T.C.H. as rendered by a single 25-year-old man, served as a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of Claimant's developmental disability.

The progress reports<sup>3</sup> show the adult male worker taking Claimant alone on hiking excursions in remote settings. The adult male worker and Claimant went to movies, played video games, and went to lunch together. And the two went swimming in a public pool. The man introduced Claimant to playing a guitar. They read comic books and watch cartoons together. At times, the H.A.T.C.H. worker took Claimant to street fairs. Claimant and the man took Tai Chi lessons. And there were occasions when the man brought Claimant to his apartment to meet the man's adult roommate and adult friends. And Claimant, the worker and his friends have watched televised "ball games." But, the H.A.T.C.H. worker has not exerted efforts to expose Claimant to groups of his peers, namely teenagers.

11. Ms. Leung and Claimant's mother were not persuasive that the H.A.T.C.H. program as implemented has been a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability.

12. Claimant has derived some benefits from his socialization training program through the adult male worker of H.A.T.C.H. Learning to interact with an adult male may have been a huge step for Claimant attaining to overcoming his anxiety and fear of people, which may

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<sup>3</sup> The H.A.T.C.H. program seems to have been of marginal success. Although the 17-year-old teenager interacts with his 25-year-old counselor, the young man has not been exposed by the H.A.T.C.H. worker to groups that cater to teenagers. There is no explanation in the progress notes for the inability of the H.A.T.C.H. worker to escort Claimant to youth programs, such as the Boys Scouts, Boys' and Girls' Clubs, YMCA youth leagues, extracurricular social groups, such as computer clubs (Claimant showed the H.A.T.C.H. worker that he has written computer program), the chess club, or some other group of young people.

be associated with the autism that impacts him. It is clear that Claimant's mother is very focused on Claimant acquiring needed interpersonal and socialization skills. She notes progress with the adult man's involvement with Claimant's development of a sense of humor. Claimant's mother advanced that it would be very difficult for Claimant to end his one-on-one relationship with the H.A.T.C.H. worker.

The H.A.T.C.H. program is not noted to be a service necessary to enable Claimant to remain in his home, or that no alternative service is available to meet Claimant's needs.

13. The foregoing described positive benefits notwithstanding, it was not demonstrated that such services were a "primary or critical" means for ameliorating the effects of Claimant's developmental disability. The progress notes of H.A.T.C.H. are persuasive on this point. Those notes show limited realm to which Claimant has been exposed. And there is no indication that the hikes, movie going, game play and interactions with the adult male worker and some of his friends have ameliorated the effects of Claimant's autism spectrum disorder, which is of a mild level.

#### *Ultimate Finding*

14. Claimant has clearly benefited from the socialization training services provided to date through H.A.T.C.H. However, it was not established that the services rendered through the input of one adult man is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of Claimant's developmental disability, or that the services are necessary to enable him to remain in his home and no alternative services are available to meet his needs.

### LEGAL CONCLUSIONS

1. Effective July 28, 2009, section 4648.5 of the Lanterman Act provides:

(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional center's authority to purchase the following services shall be suspended pending implementation of the Individual Choice Budget and certification by the Director of Developmental Services that the Individual Choice Budget has been implemented and will result in state budget savings sufficient to offset the costs of providing the following services:

(1) Camping services and associated travel expenses.

(2) Social recreation activities, except for those activities vendored as community-based day programs.

(3) Educational services for children three to 17, inclusive, years of age.

(4) Nonmedical therapies, including, but not limited to, specialized recreation, art, dance, and music.

(b) For regional center consumers receiving services described in subdivision (a) as part of their individual program plan (IPP) or individualized family service plan (IFSP), the prohibition in subdivision (a) shall take effect on August 1, 2009.

(c) An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of a service identified in subdivision (a) when the regional center determines that the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer's needs.

2. *Burden of Proof:* A service agency seeking to change a service contained in a Claimant's IPP typically has the burden of demonstrating that its proposed decision is correct. In this matter, the service agency's case management supervisor has determined that it must discontinue socialization training services previously provided for Claimant due to enactment of section 4648.5. The service agency determined that such services are no longer authorized and that claimant did not otherwise qualify for an individual exemption.

Claimant bears the burden of establishing his entitlement to an exemption under subdivision (c). (Evid. Code, § 500.)<sup>4</sup> Claimant has not met that burden.

*Pursuant to Section 4648.5, the service agency appropriately suspended purchase of Social Recreation Activities for Claimant:*

3. Section 4648.5 expressly prohibits regional centers from purchasing social recreation services, by suspending their authority to do so. The sole exception to this requirement is for social recreation activities which are "vendored as community-based day programs." (Welf. & Inst. Code, § 4648.5, subd. (a)(2).)

The Legislative intent in enacting section 4648.5 is clear: the itemized social recreational activities may not be purchased by regional centers unless: (1) they are vendored as community-based day programs, or (2) an exemption is granted under section 4648.5, subdivision (c). The legislative purpose in suspending regional centers' purchasing authority for these services must be understood within the context of the urgent need to find a more cost-effective means for funding services to consumers. As indicated in the Legislative Counsel's Digest to the recent

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<sup>4</sup> California Evidence Code section 500 states that "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

urgency legislation, the new law, as set forth in section 4648.6, requires the Department of Developmental Services, in consultation with stakeholders, to "develop an alternative services delivery model that provides an Individual Choice Budget for obtaining quality services and supports that provides choice and flexibility within a finite budget that, in the aggregate, reduces regional center purchase of service expenditures, reduces reliance on the state General Fund, and maximizes federal financial participation in the delivery of services."

*Claimant does not come within section 4648.5, subdivision (c):*

4. As set forth in Factual Findings 4 through 6, 8, and 10 through 14, the loss of socialization training services will not threaten Claimant's ability to remain in his home. Claimant has also failed to show that these services are "a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability. . . ."

The Legislature has required a showing of "extraordinary circumstances" to qualify for this exemption. This high standard indicates that the exemption should be narrowly construed. Claimant has benefited from the socialization training services provided through H.A.T.C.H. It has provided opportunities for regular community/social interaction that he could not otherwise do alone. Claimant has gained some benefit from services from a single worker, who has provided some manner of social instruction, encouragement, safety and companionship to claimant on a regular basis. However, these benefits do not rise to the level of being "a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability."

5. The above matters having been considered, Claimant does not qualify for an exemption under section 4648.5, subdivision (c).

#### ORDER

The appeal of Claimant Curtis C. is denied. The service agency's decision to terminate the funding, and or provision, of Claimant's social recreation services is upheld.

DATED: December 14, 2009

/s/  
PERRY O. JOHNSON  
Administrative Law Judge  
Office of Administrative Hearings

#### NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)